

HliWconC

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

16 Cr. 370 (CM)

5 MATTHEW CONNOLLY and
6 GAVIN CAMPBELL BLACK,

7
8 Defendants.

Conference

9 -----x
10 New York, N.Y.
11 January 18, 2017
12 2:00 p.m.

Before:

13 HON. COLLEEN MCMAHON,

14 District Judge

15 APPEARANCES

16 LORETTA E. LYNCH
17 United States Attorney for the
18 Southern District of New York
19 RICHARD A. POWERS
20 CAROL L. SIPPERLY
21 MICHAEL T. KOENIG
22 Trial Attorneys
23 Fraud Section, Criminal Division

24 PAUL HASTINGS LLP
25 Attorneys for Defendant Connolly
KENNETH M. BREEN
PHARA A. GUBERMAN

LEVINE LEE LLP
Attorneys for Defendant Black
SETH L. LEVINE
JILLIAN B. BERMAN
AARON I. KARP

HliWconC

(Case called)

THE COURT: Good afternoon.

MR. POWERS: Good afternoon, your Honor. Richard Powers, Carol Sipperly, and Michael Koenig, for the government.

MR. BREEN: Kenneth Breen and Phara Guberman, for Mike Connolly. Good afternoon, your Honor.

MR. LEVINE: Good afternoon, your Honor. Seth Levine, Jillian Berman, and Aaron Karp, for Mr. Black.

THE COURT: OK. Have a seat. We have clients who are excused from appearing, I believe.

MR. BREEN: Correct.

MR. LEVINE: Yes, your Honor. Thank you.

THE COURT: Where are we?

MR. POWERS: Your Honor, since the last time we met, in September, the government believes it's produced the bulk of discovery and the defendants have that and have had some opportunity, we understand, to go through it. Several weeks ago we started exchanging letters related to the discovery, and the parties have gone back and forth on those letters. And we're in the process now of more or less figuring out where we can agree.

THE COURT: And where you need my help to agree?

MR. POWERS: Yes, your Honor. Exactly. We're hoping to sort of streamline it for your Honor by only bringing issues to you that we just cannot agree. I think at this point it's

HliWconC

1 probably worth noting that we anticipate there are two issues
2 now where we think it's safe to say we don't agree. One is
3 with respect to defining the scope of the prosecution team for
4 this case.

5 THE COURT: What?

6 MR. POWERS: Sorry, your Honor.

7 THE COURT: Say that again.

8 MR. POWERS: The scope of the prosecution team for
9 purposes of discovery.

10 THE COURT: Scope of the prosecution team?

11 MR. POWERS: Yes, your Honor. In other words, the
12 government's position here is that the prosecution team is,
13 from the Department of Justice, the criminal division, the
14 antitrust division, and the Federal Bureau of Investigation. I
15 don't want to speak for the defendants, but my understanding is
16 they take a broader view in terms of some of the other agencies
17 that participated in their own, our position, parallel fashion
18 investigating the LIBOR matter, including international
19 regulators and whatnot and prosecutorial authorities, and that
20 has bearing on what the government's obligation is.

21 THE COURT: Not only does it have bearing, but I want
22 it briefed in the next three weeks. I'm not going to wait for
23 you to all talk about it. I want it briefed. I want it
24 briefed in the next three weeks so I can decide it by the end
25 of February so that somebody doesn't tell me in a year that I'm

HliWconC

1 going to have to postpone the trial because I make a decision
2 that the government doesn't like. That's happened to me once,
3 and I will not be bitten in the bud again.

4 MR. POWERS: Yes, your Honor. Just to make sure I
5 understand the timing, when you say briefed in the next three
6 weeks --

7 THE COURT: I mean I want everything briefed. You
8 know what your positions are. You can exchange simultaneous
9 briefs in two weeks and responses to those simultaneous briefs
10 one week after that. Two weeks from today is the 1st of
11 February and three weeks is the 8th of February.

12 What other agencies do you all think are involved? Go
13 ahead.

14 MR. LEVINE: May I be heard, your Honor?

15 THE COURT: Yes.

16 MR. LEVINE: Your Honor, frankly, we are thrilled to
17 brief this issue so quickly, but I think some of this could be
18 resolved, maybe even right now, because if we just take the
19 government's word for it, what they've told the American
20 public --

21 THE COURT: Actually, you can't resolve it right now
22 because it hasn't been presented to me.

23 MR. LEVINE: Yes.

24 THE COURT: I haven't had time to think about it, so
25 I'm telling you to brief it.

HliWconC

1 MR. LEVINE: Yes. I appreciate that. Let me answer
2 your question, your Honor, by saying that we would say the
3 prosecution team consists of the people that are contained in
4 the Department of Justice's press releases about who they
5 worked with and cooperated with on this case.

6 THE COURT: Which includes?

7 MR. LEVINE: The CFTC; the British regulator, FCA; the
8 Securities and Exchange Commission, United Kingdom Serious
9 Fraud Office; BaFin, the German regulator; the European Central
10 Bank, all of these, your Honor. And I'm happy to hand up to
11 you the government's press release, and there have been
12 numerous releases.

13 THE COURT: The odds that you're going to win on that
14 broad a definition are somewhere between slim and none, but I'm
15 interested to read your brief. The CFTC and the SEC are one
16 thing. U.K. Serious Fraud Office is another.

17 MR. LEVINE: Your Honor, I take it that given in this
18 case the reason that I am standing in this courtroom when my
19 client has been required to travel across the Atlantic and
20 stand trial here, instead of as many of his countrymen, in
21 England, is because as the Serious Fraud Office told us when we
22 were directed to speak to them that there was an agreement to
23 divide the LIBOR-related cases up and this case and my client
24 to be brought here.

25 THE COURT: Fine. I'm just telling you, you can brief

HliWconC

1 the issue. If there was an agreement to divide, that suggests
2 that the Serious Fraud Office was not part of the prosecution
3 team.

4 MR. LEVINE: They took some of the cases.

5 THE COURT: I get that.

6 MR. LEVINE: The point is, your Honor, we also think
7 that the government, to the extent that they're going to
8 contest what's in their press release, should be required to
9 provide us factual information about the precise relationship
10 between these entities given what they've said. The reason,
11 and you've asked for simultaneous briefing, your Honor, and we
12 actually think that if the government is going to disavow what
13 they have said in the circumstances, this may be --

14 THE COURT: I can tell you, it's all very preliminary
15 in my head.

16 MR. LEVINE: Yes, your Honor.

17 THE COURT: It occurs to me, acting as a litigator,
18 that the government could take the position that it had
19 cooperated with a number of people and that they were not part
20 of the prosecution team within the meaning of Rule 16 and that
21 those positions were not necessarily inconsistent.

22 MR. LEVINE: I think, your Honor, there are two
23 issues. I understand that. I think there are two issues. Of
24 course, while there's Rule 16, what we take much more seriously
25 here is the Brady issue.

HliWconC

1 THE COURT: There's not one that's more serious than
2 Brady. Brady was, of course, the issue that came up in the
3 Newburgh case.

4 MR. LEVINE: And I think here one of the issues that
5 we are confronting --

6 THE COURT: But that's not the prosecution team.
7 That's whether it's under the control of the government.

8 MR. LEVINE: Right,

9 THE COURT: And I have to tell you, there's a lot of
10 law that says if the New York State authorities have it, it's
11 not under the control of the federal government for Brady
12 purposes, and if that's true of New York State, I'm having a
13 hard time thinking about how if it's in Germany it's going to
14 be under the control of the federal government. The fact that
15 the federal government has seen it doesn't mean it's under the
16 control of the federal government, I think. I think that's the
17 law. You will have an opportunity to persuade me otherwise.

18 MR. LEVINE: I'm only saying, your Honor, because I do
19 think that this is a fact-specific question about, as the Court
20 points out, questions of control, questions of interaction, one
21 thing that is difficult is that the government will likely take
22 factual positions on the nature of their interactions, and all
23 I'm asking for is that the Court consider giving us an
24 opportunity to test those things, because one of the things, as
25 the government has repeatedly said in its press release, is

HliWconC

1 they talk about the nature of the great benefits and their
2 relationships with these other entities. And in fact here, the
3 unique issue, your Honor, is that were my client, like his
4 countrymen, standing trial with the SFO in London, we would not
5 have to have this conversation because most of the materials
6 that we want he would have access to.

7 Additionally, on other discovery issues, your Honor,
8 we are very cognizant of the Court's direction to move with
9 speed here. One of the reasons this also has to be resolved is
10 if, in fact, the Court were not to find that the government has
11 to give us access to some of these materials, the government
12 has in other cases allowed or not objected to letters rogatory
13 and other information that we think is crucial.

14 THE COURT: I just told you to get it briefed in three
15 weeks so I could decide it. Don't plan on taking any vacations
16 in the next 12 months.

17 MR. LEVINE: Thank you, your Honor. There are a few
18 other issues that we wanted to raise.

19 THE COURT: Let the government finish first, because I
20 interrupted by saying that I wasn't going to wait on that
21 issue.

22 MR. POWERS: Yes, your Honor. The other issue that we
23 think is sort of ripe for briefing at this point relates to a
24 request from the defendants for particulars from the
25 government, and while we're willing to work with them, as I

HliWconC

1 said, on some of the issues I think we're at an impasse.

2 THE COURT: If they want a bill of particulars and
3 you're not giving them a bill of particulars, they're free to
4 make a motion.

5 MR. POWERS: Yes, your Honor.

6 THE COURT: We decide bill of particulars motions all
7 the time. Often we deny them, sometimes we grant them.

8 MR. POWERS: Understood, your Honor.

9 I believe what we discussed, your Honor, between
10 government and counsel, was those are the two main issues, and
11 then everything else, the other issues, we'll try to work
12 through and perhaps come back in a month's time to update your
13 Honor on where we are with respect to the remaining issues.

14 THE COURT: OK.

15 Now you may speak.

16 MR. LEVINE: Thank you very much, your Honor. I agree
17 with counsel that we should come back in a month. There are a
18 couple of issues that I want to flag for the Court because I do
19 that think it's important that the Court understand what we're
20 dealing with on the discovery front. A production has been
21 made, which unfortunately, is not in our view the great
22 majority of discovery. There was a production that was made of
23 approximately one and a half million documents, about 16
24 million pages. Of that, we have, in December, received an
25 index that based on our ability to analyze, only contains about

HliWconC

1 20 percent, 23 percent of the documents that have been
2 produced. I understand the government is going to try to
3 address that issue in the next month, to the best of their
4 ability.

5 THE COURT: What does that tell you? That tells you
6 they haven't read the other 77 percent of the documents. You
7 know that and I know that.

8 MR. LEVINE: I wouldn't presume, because I think that
9 one of the problems is the other million documents we know are
10 from the CFTC which were given to the government, and so we are
11 hoping they would use their good offices to see whether there
12 are indices for those, because it is very important.

13 The other issue, Judge, that I think is really
14 critical is those documents, by and large, relate solely to
15 Deutsche Bank. There are documents from other parties, but
16 most of it is from Deutsche Bank. There is another database
17 which the government possesses which contains, we understand,
18 12 million documents, not 12 million pages, but tens of
19 millions of pages, which has all of the information from other
20 counterparties in this case.

21 The theory of this case is that our clients somehow
22 defrauded Goldman Sachs and J.P. Morgan and Bear Stearns, and
23 while we'll talk about whether that's a real theory later, we
24 have asked the government to give us access to that because we
25 think it has crucial information about Brady and about the

HliWconC

1 nature of the trading here that is the core of the trial. I
2 know the government is going to go back and see what they can
3 do, and we're appreciative of them using their good offices for
4 that, but I point this out only because that information needs
5 to, under every circumstance, be searched for Brady, because we
6 think there's a massive amount, and we have to have the ability
7 to get access to it. I only raise it, Judge, because the
8 enormity of the size of even that database is so large, it
9 could be, I don't know, 50 million, 100 million documents.

10 Additionally, one of the other issues that we are
11 concerned about is the government is not yet capable of telling
12 us who the supposed counterparties are that were defrauded
13 beyond Goldman Sachs and J.P. Morgan. They say they're going
14 to look at that, but for each of those counterparties we are
15 going to have to be able to get information to address that. I
16 understand the government is going to do what they can, and we
17 appreciate the fact that they're going to give us some
18 information on these issues, but the remarkable scope of the
19 government's theory here and the notion that they may have
20 dozens, many counterparties that we're going to have to address
21 just raises lots of issues, so we hope when we come back here
22 in March that we can have a plan to make sure we can get access
23 to materials in a reasonable way because otherwise it will make
24 this process very unwieldy.

25 THE COURT: The process is already unwieldy.

HliWconC

1 MR. LEVINE: I'm trying to be optimistic, your Honor.

2 THE COURT: Don't. It's unwieldy. It's unwieldy at
3 the present level.

4 MR. LEVINE: Right. I think that the key is for us to
5 make sure we have these indices and make sure we can get access
6 to this database in a reasonable way, because I know we've
7 looked closely at your rulings and I understand you do not want
8 to entertain often applications for subpoena until we have
9 figured out exactly what's in the government's position, and so
10 we want to do this quickly because to the extent that there are
11 gaps in what the defense needs, we want to be able to present
12 that to you in full knowledge of what has already been
13 gathered, because we do think in this case there is real
14 substantial need potentially for, as I've said, both
15 international and other domestic discovery, but we want to do
16 that consistent with this Court's prior rulings that direct us
17 to first try to get to the bottom of what the government has,
18 which is why I'm previewing this for you, having recognized the
19 Court has strong views on this particular issue. If we cannot
20 come to resolution or if there's just materials the government
21 just doesn't have, we would like to come back to you then with
22 specific, targeted requests for information. But I preview
23 that for you to know that we're following, I think, the
24 teaching in Binday where you instruct that that's how this has
25 to happen, but if there's some other way you want us to

HliWconC

1 proceed, obviously we're happy to do that. Thank you.

2 MR. BREEN: That covered it, your Honor.

3 THE COURT: That covered it.

4 Does the government have anything it wishes to say in
5 response to that?

6 MR. POWERS: Your Honor, I would just say that the
7 government doesn't necessarily agree with everything that
8 counsel just described, but again, as we said at the beginning,
9 we'll work with them and see what we can sort out and hopefully
10 come back to your Honor with whatever the sticking points are
11 in 30 days.

12 MR. LEVINE: Your Honor, may I ask one administrative
13 question?

14 THE COURT: Sure.

15 MR. LEVINE: I just want to be clear. We will now
16 immediately start briefing the team issue, who is on the
17 prosecution team.

18 THE COURT: Yes.

19 MR. LEVINE: On the bill of particulars issue, I know
20 the government is going to come back and they're going to give
21 us some information. We're happy to brief both, but it may be
22 more efficient to do that once we know what the government's
23 going to give us without wasting the Court's time.

24 THE COURT: The only thing I told you to brief is one
25 issue, and the rest of your motions will be made on a schedule

HliWconC

1 to be set, but it will be set at our next meeting.

2 MR. LEVINE: I just wanted to make sure that I
3 understood. Thank you, your Honor.

4 THE COURT: All right. Mr. O'Neill, is it possible
5 that I can meet with these folks the week of February 20? Is
6 that a bad week?

7 MR. LEVINE: Your Honor, if possible, the parties
8 tried to coordinate to meet in the afternoon of the 2nd or the
9 morning of the 3rd of March because I know that's when we're
10 all available, if that's convenient for the Court's schedule.

11 THE COURT: I'm sure you'll have a decision by then.
12 I'll be on trial. Could we do it late in the afternoon on the
13 2nd?

14 THE CLERK: 4:00, the 2nd.

15 MR. LEVINE: Thank you very much, your Honor.
16 Appreciate that.

17 THE COURT: Great. Time excluded in the interest of
18 justice, the defendants' interests in a speedy trial being
19 outweighed by the need to ascertain what the scope of
20 discovery's going to be and enable the parties to come to some
21 accommodation on disputed discovery issues.

22 Anything else today?

23 MR. LEVINE: No. Thank you, your Honor.

24 MR. POWERS: Nothing from the government.

25 MR. BREEN: No, your Honor. Thank you.
(Adjourned)